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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 38

CITY OF EL PASO, - - - - - - Appellant,

versus

GREENBERRY SIMMONS, - - - - Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLEE.

HAROLD S. LONG,
El Paso National Bank Bldg.,
El Paso 1, Texas,
GREENBERRY SIMMONS,
Kentucky Home Life Bldg.,
Louisville, Kentucky,
Counsel for Appellee.

September 18, 1964

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Opinion below 1

Jurisdiction 1

Question presented 2

Constitution and Statute involved 2, 8, 12

Statement 3–6

Summary of Argument (See under separate cover Appendix D for Appellee Simmons, pp. 16b-16i) 6

Argument:

I. The statute in force at the time the contract was made, as expressed and stipulated in the terms of the "OBLIGATION" itself, created an obligation of the State, to reinstate the contract if payment was made before the intervention of the rights of others and could not be impaired by subsequent legislation without being repugnant to Art. 1, Sec. 10 of The Constitution . . . 7–12

II. The decision below should be affirmed 12–16

Conclusion 17

Appendix:

Appendix D for Appellee Simmons, Under separate cover

Printed Brief for Courts Below 2, 4, 6, 8, 10, 13

Appendix K for Appellee Simmons, Under separate cover

Accrued steps since C.A. 5 Decision in the Lower Courts, exercised under the discretion of the District Judge, as City has made no application to stay the proceedings under S. Ct. Rule 18 (1) or any other rule 14–15

CITATIONS.

Cases:

	PAGE
Anderson et al. v. Neighbors, 94 Tex. 236, 59 S. W. 543, 544	13
Dakota County v. Glidden, 113 U. S. 222, 226	14
Faulkner v. Lear, 258 S. W. 2d 147 (Civ. App. Tex.)	11
Greenberry Simmons v. City of El Paso, 320 F. 2d 541 (case below, R. 153-158)	1, 12
Gulf Production Co. v. State, 98 Tex. 237, 231 S. W. 124, 131, 134, (Tex. Civ. App. 1921, err. ref.)	10, 13
Home Insurance Co. v. Dick, 281 U. S. 397, 406, 411, 74 A. L. R. 701	12
Waggoner v. Flack, 188 U. S. 595	11
Wilson v. Standifer, 184 U. S. 399	11

Constitution:

U. S. Const., Art. 1, Sec. 10	2, 12

Texas Statutes:

Chapter 129, Acts of May 19, 1897, Art. 4218f, pp. 184-185 S.S.B. No. 63, 25th Leg. Batts' Digest Art. 4218f; Sayles' Ann. Civ. St. (later part of Art. 5423 and 5326) For whole of Art. 4218f, see Appendix D for Appellee Simmons, under separate cover, pp. 55-56.	
(Reinstatement Act not forfeiture Act, at time Contract was made in 1910. Later put together under Art. 5423 then later 5326)	8, 7, 2, 10
Acts 1941, Ch. 191, Sec. 3, p. 351, 47th Leg. (15A Vernon's Ann. Civ. St. Tex. Art. 5326 formerly Art. 5423).	
See Appendix D for Appellee Simmons, pp. 51-58.	3

PAGE

Acts 1951, Ch. 59, Sec. 2, p. 32, 52 Leg. (15A Vernon's Ann. Civ. St. Tex. Art. 5326 formerly Art. 5423 3

Acts 1955, Senate Bill No. 295, Ch. 278, 54th Leg. Regular Session 1955 (not in any Vernon's Civil Statutes of the State of Texas, reputed to be a local Act and was found in Sect. of States' office) 3

For all four above Acts, see Appendix D for Appellee Simmons; pp. 55-64, under separate cover.

Acts of March 25, 1897, Ch. 37, p. 39, 25th Leg. (Forfeiture Act not reinstatement Act). These were separate Acts when Contract was made. Later put together under Art. 5423, then later Art. 5326 10

Miscellaneous:

S. Ct. Rule 18(1) 14

F. R. Civ. P., Rule 36 15

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GREENBERRY SIMMONS, - - - - - *Appellee.*

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BRIEF FOR APPELLEE.

OPINION BELOW.

The Opinion of the Court of Appeals is reported in 320 F. 2d 541 (R. 153-158).

JURISDICTION.

Jurisdiction is based upon the diversity of citizenship and is set forth in the Complaint. This Court has noted probable jurisdiction.

QUESTION PRESENTED.

After the State had specifically expressed and stipulated in the terms of the "OBLIGATION" itself, to reinstate the land at any time before the land had been resold to a third party, and after the Settlers-Vendees built their homes and lived on the lands for three years and paid interest for over thirty years, totaling more than the purchase price, does it impair the Obligation of this Contract for the State to subsequently change these expressed stipulated terms to reinstate, to five years from the date of forfeiture, after the contract had been substantially complied with by the Settlers-Vendees.

THE CONSTITUTION AND STATUTES.

The pertinent provision involved of the Constitution of the United States is the impairment of the obligation of contract. *Art. 1, Sec. 10*, which provides:

> "* * * No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

The Texas statutes expressly stipulated in the terms of the "OBLIGATION" include *Art. 4218f. Texas, Arts, May 19, 1897, ch. 129*, pp. 184-185, S. S. B. No. 63, 25th Leg. (Later part of Art. 5423 and 5326. By the time both of these Article numbers were later being used, forfeiture and reinstatement were put together in one Article.) (See page 8 of this Brief, for whole Art.

4218f, see Appendix D for Appellee Simmons, pp. 55-56.)

Acts 1941, ch. 194, p. 351, Sec. 3, 47th Leg., cited as Vol. 15A, Vernon's Civil Statutes Annotated, and same article for the *Acts 1951*, ch. 59, p. 92, Vol. 15A, Vernon's Civil Statutes of the State of Texas Annotated (Art. 5326).

Acts of 1955, Senate Bill No. 295, ch. 278, 54th Leg., filed in the Secretary of State's Office May 23, 1955. Not in any Vernon's Civil Statutes of the State of Texas, as it was reputed to be a local act. (All above Acts may be found in Appendix D for Appellee Simmons, pp. 55-64, under separate cover.)

STATEMENT.

The "OBLIGATION" of the Contract (Pl. Ex. 16; R. 67) between the Settler-Vendees' predecessors in title and the State was made pursuant to the statute, and the provisions of the statute became the terms of the contract. (Appendix D For Appellee Simmons, pp. 55-56, under separate cover).

In the "OBLIGATION" of the Contract (Pl. Ex. 16; R. 67-68), the State expressly stipulated an obligation of its own, to the Settler-Vendees to reinstate his already forfeited lands, the same as it stipulated to give him a patent, provided he had built his home and lived there for three years and paid all interest before it was resold to a third party. If he did this, it would be the same as if no forfeiture had ever occurred.

The Settlers-Vendees had recorded their "Certificate of Three Years Residence" (Pl. Ex. 2a, 2; R. 48, 46-47) in the Clerk's Office and was then unable to pay his interest and his land was forfeited. This forfeiture gave the State the right to resell the forfeited land at any time before all back interest was tendered. However, this forfeiture did not in any way release the State from its expressly stipulated obligation to reinstate the Settler-Vendee's land. Here, he had tendered all back interest before the State resold the land to a third party, and having done so, it was the same as if no forfeiture had ever occurred (Pl. Ex. 32b, 32c, 32d, 32e; R. 120, 121).

After thirty years of substantial compliance of this obligation by Settlers-Vendees and also after they had paid more interest than the purchase price of the land, the legislature passed the Acts of 1941 and 1951 (Appendix D, pp. 57-60), without changing the original expressed provisions and terms as to reinstatement. It further provided that reinstatement must be made within five years from the date of forfeiture.

On July 21, 1947, the land was forfeited for nonpayment of interest. Any time after forfeiture and before reinstatement, the State could have and generally did resell this land, but here it did not do so.

On July 14, 1952, Settler-Vendee Simmons recorded his deeds in the County Clerk's Office (Pl. Ex. 28, 30; R. 104, 110).

Three and one-half years before the State attempted to resell this land, on July 23, 1952, the Land Com-

missioner for the State received sworn application, dated July 17, 1952, stating that Simmons was the owner and that he reinstated the land and tendered checks for all back interest (Pl. Ex. 32b, 32c, 32g, 32; R. 120, 121).

On July 24, 1952, the Land Commissioner sent a letter stating that they were not filed within the five year period. He did not complain about the forfeiture, but about the reinstatement. This five year limitation had been subsequently added in 1941 and 1951 Acts (Pl. Ex. 32; R. 116).

The Settler-Vendee had substantially complied with the terms of the statutory requirements for reinstatement of his land, under the expressed stipulation of his Obligation of Contract (Appendix D, pp. 16e-16f). His deeds had been recorded in the County Clerk's Office, there was nothing else required of him (Pl. Ex. 28, 30; R. 106-107, 112).

On January 26, 1956, three and one-half years later, the State issued patents to the City, pursuant to the Act of 1955 of the Legislature, which act provided for sale to the City of 14,000 acres of land, including and attempting the reselling of Simmons' reinstated lands to the City (Appendix D, pp. 61-64). The City was a subsequent purchaser with constructive notice (Appendix D, p. 54; R. Index pp. I-VII, Pl. Ex. I-33A, 82 pages of recorded instruments for over 45 year period).

When the Settler-Vendee found that his land had been later resold, he immediately brought this suit,

called in Texas, trespass to try title, against the City of El Paso on August 31, 1961, to determine whether the City's three and one-half year subsequent claim should prevail over this Settler-Vendee's prior reinstatement and prior recorded deeds (R. 4).

Both parties made Motion for Summary Judgment and the District Court held that the Plaintiff Simmons take nothing and that the City prevail. Simmons, appealed this to the Court of Appeals, which reversed the District Court and ruled that Simmons had reinstated his lands and was the prior recorded owner. That the Legislative Acts of 1941 and 1951, adding a five-year limitation from the date of forfeiture, impaired the expressed terms of the obligation of the contract, which had already specified a limitation of its own pertaining to reinstatement of forfeited lands. The City appealed this to this Court, which noted probable jurisdiction.

Appellee Simmons, in support of his Motion to Affirm, filed under separate cover, his already printed brief for both Courts below, marked Appendix D For Appellee Simmons. To prevent repetition and if further information is desired, we refer to (a) on the Statement of the Case (Appendix D, pp. 6-15), (b) Brief or Summary of the Argument (Appendix D, pp. 16b-16i) and (c) Argument on Impairment of the Obligation of Contract, Point IV (Appendix D, pp. 43-52). This appendix is likewise made an Appendix D For Appellee Simmons on this Brief on the Merits.

ARGUMENT.

I. The Statute in Force at the Time the Contract Was Made, as Expressed and Stipulated in the Terms of the "Obligation" Itself, Created an Obligation of the State, to Reinstate the Contract if Payment Was Made Before the Intervention of the Rights of Others and Could Not Be Impaired by Subsequent Legislation, Without Being Repugnant to Art. 1 Sec. 10 of The Constitution.

Settlers Glenn and Kilpatrick, the predecessors in title of Vendee Greenberry Simmons, in 1910 made the following applications to purchase the land herein involved.

The application says:

> "I hereby apply to purchase under the provision of * * * ch. 129, Act of May 19, 1897 * * *."

The "OBLIGATION" itself of the Contract says:

> "* * * purchased by me this date of the State of Texas, in accordance with the provisions of * * * ch. 129, Act of May 19, 1897 * * *."

Signed by both Settlers Glenn and Kilpatrick. On the back of this contract it says:

> "Awarded Apr. 30, 1910," signed "J. H. Robinson," "Commissioner General Land Office." (Pl. Ex. 16; R. 67-68, 138-141).

When the Land Commissioner awarded this land to these settlers in 1910, he obligated the State of Texas under the specified part of the Contract called "OBLI-

GATION", in accordance with the provisions of chapter 129 of the Act of May 19, 1897, Art. 4218f. This Article 4218f specifically expressed and stipulated, a limitation of its own in the statute, for a method of reinstating lands which had already been forfeited, provided it had not been resold to a third party, meaning that no rights of third parties had intervened, which is as follows:

> "In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

The Statute (Art. 4218f) at the time the contract was made in 1910, further provided that:

> "* * * such lands shall be subject to sale, but to actual settlers only * * *. And if he or his vendor has already resided upon his home section for three years, * * *, the additional lands purchased may be patented at any time." (Appendix D For Appellee Simmons, pp. 55-56, all of Art. 4218f, ch. 129, Act of May 19, 1897).

Settlers Glenn and Kilpatrick immediately moved upon these lands and built their homes upon them and spent $2,850.00 for improvements, lived on these lands

for three years following, and in 1913 obtained their "Certificate of Three Years Residence" from the General Land Commissioner and recorded them in the Deed Book of the County's Clerk's Office (Pl. Ex. 2, 2a, 17; R. 46, 48, 69).

Soon after, the legislature amended Art. 4218f. ch. 129, so that land could be sold to others not settlers.

Between the years 1910 and 1941, the settlers and their vendees paid interest on these contracts for over thirty years, which amounted to more than the purchase price of the land.

The State had wanted the settlers so badly that they have extended from time to time the payment of principal, which they have never called to become due. (Various statutes from time to time.)

After the Settlers-Vendees had substantially complied with the obligations of their contract for over thirty years, the State Legislature passed an act, limiting the right to reinstate to a term of five years from the date of forfeiture, which was repugnant to the expressly stipulated terms of reinstating this land, which had obligated the State in 1910; namely, to reinstate the land which had already been forfeited, provided the State had not resold this land to a third party.

The State could not do this under the pretense of a remedy or under any other pretense, because it had in the "OBLIGATION" itself of the Contract, stated, an expressed stipulation of its own, in the terms of reinstating land which was already forfeited, and when the legislature attempted subsequently to change this,

it impaired the obligation itself of its own contract, which it had agreed and expressed to do, back in 1910 (Appendix D, p. 16i).

The Courts of Texas have held that this right to reinstate forfeited lands, provided the State has not resold this land to a third party, has been held to be a right which cannot be changed by legislation without the consent of both parties. *Gulf Production Co. v. State*, 98 Tex. 237, 231 S. W. 124, 131 (Appendix D For Appellee Simmons, p. 27, History p. 26, 16f).

There was and is a great difference, both in the Texas statutes and in the well settled cases in Texas, between forfeiture and reinstatement. A mere forfeiture in this case is admitted, and is not a vested right, whereas the reinstatement of land which is already forfeited is the issue here and is a vested right. It provides for more obligations on the part of the State than the ordinary redemption statutes.

The forfeiture only, was then covered by ch. 37, Acts of March 25, 1897, p. 39, which was passed in the same year 1897; however, it is a different chapter from the reinstatement of land already forfeited, covered by ch. 129, Act of May 19, 1897, p. 185, in Art. 4218f. The latter was a part of the "OBLIGATION" itself of this Contract, at the time it was made in 1910.

Later, when these two statutes were put together under one Art. 5423, which later became Art. 5326, a Texas Court in 1921 set out the difference between the statute covering forfeiture and the statute covering reinstatement (Appendix D, p. 29).

Waggoner v. *Flack*, 188 U. S. 595 and *Wilson* v. *Standifer*, 184 U. S. 399, are inapplicable here. They construe the forfeiture only statute, whereas the issue here is the construction of the reinstatement statute and as it was in 1910, at the date of this Contract, Art. 4218f.

Furthermore, in the immediately named cases and also in the *Faulkner* v. *Lear*, 258 S. W. 2d 147, the Settlers-Vendees there failed to pay all back interest before the State resold the land to third parties. In the case at bar the Settlers-Vendees tendered all back interest three and one-half years before the state sold to the City and fully complied with their reinstatement statute, which also expressly stipulated in the terms of the "OBLIGATION" itself, all such cases "shall thereby become as binding as if no forfeiture had ever occurred."

The State could not complain that the Settlers-Vendees' lands were forfeited, because it had expressly stipulated in the terms of the obligation of this contract, if all back interest was paid before the intervening rights of third parties, the "original obligations" of both parties would become "as binding as if no forfeiture had ever occurred."

What were the expressed stipulated terms in the "OBLIGATION" itself, of the State, under Art. 4218f? It was not that the land be not forfeited. It was that upon payment of all back interest before resale, that these expressed and stipulated terms of the "Original Obligations" of the State "become as binding as if no forfeiture had ever occurred."

Then subsequently this expressed and stipulated original obligation was impaired by the 1941 and 1951 Acts, attempting to change to five years from forfeiture, when under its "Original Obligation," it could not make any change, after thirty years of substantial compliance, without violating the rights given Settlers-Vendees under Art. 1, Sec. 10 of the Constitution of the United States.

In the case cited by the Court of Appeals of *Home Insurance Co.* v. *Dick,* 281 U. S. 397, Mr. Justice Brandeis said, at page 411:

> "But in Texas, as elsewhere, this contract was subject to its own limitations."

Again, at page 406:

> "Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is in expressed terms in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined."

II. The Decision Below Should Be Affirmed.

Judge Jones for a unanimous Court of Appeals, said:

> "The Obligations, accepted by the Texas Land Commissioner, recited the purchase of the described land in accordance with the provisions of the foregoing Statutes of Texas."

He went on to set out the reinstatement portion of the Statute, which had hereto been quoted. Then he quoted the Statute which was passed in 1941 and 1951, putting in the five year limitation from the date of forfeiture. He then set out the substantial compliance by the Settler-Vendees and the letter from the Land Commissioner acknowledging the receipt of the applications to reinstate and the checks for the payment of all back interest. Then he said at page R. 156:

> "The contract between the Appellant's Predecessor in Title and the State was made pursuant to the Statute, and the provisions of the Statute became the terms of the contract."

On R. page 157 of his Opinion, he went on to state what the Texas Court had done with reference to the reinstatement of land already forfeited, provided no rights of third parties had intervened, and cited what the *Gulf Production Co.* v. *State*, Tex. Civ. App. 231 S. W. 124, 131, had said that neither the State nor the purchaser could arbitrarily and without the consent of the other, write into the contract any provision restricting the terms of the contract. Also at p. 134 of the last cited case, it states that it is a vested right.

Since 1900, in *Anderson* v. *Neighbors*, 94 Tex. 336, 56 S. W. 543, 544, this statute has been held to give the Settlers-Vendees, after they have spent three years upon their lands, a vested right, to reinstate their forfeited lands,[1] entitling them to the protection of Constitutional guarantees. Then Judge Jones goes on to

[1]For a list of further Texas cases on reinstatement being vested rights, see Appendix D, pp. 16h, 16f, 28, 36.

say that the statute in force when the purchase was made gave the purchaser a right to redeem from forfeiture, and it was not one dealing with a remedy, but on the contrary, creating an obligation of the State to reinstate the contract if payment was made before the intervention of the rights of others, which was done in this case.

Although the Court of Appeals adjudged that Simmons was the prior recorded owner of these lands, it remanded the case to the District Court, because it stated that the District Court did not consider the Defendant's defenses of adverse possession and laches. There have been some steps taken in the Courts below since it was returned to that District Court, and this Honorable Court may desire to be informed as to these steps taken, since the decision of the Court of Appeals, or the Court may desire to take judicial notice of these steps. *Dakota County* v. *Glidden*, 113 U. S. 222, 226.

The City has not made an application or motion for a stay of the proceedings in the lower courts under this Court's Rule 18 (1) or any other rule. On September 26, 1963, the mandate of the Court of Appeals went to the District Court with instructions as aforesaid. The District Judge on February 7, 1964, set this case for a pre-trial hearing for April 20, 1964 at 2:00 p. m. He also put it upon his docket for the 13th of April, stating that:

> "Copies of all papers * * * must be furnished to the Court not later than ten (10) days before April 13, 1964." (Appendix K For Appellee Simmons, p. 48, under separate cover).

Appellee Simmons here, Plaintiff Simmons below, on April 1, 1964, abiding by the discretion exercised by the new District Judge, and ten days before the docket was called, filed printed "Plaintiff's Request for Admissions Under Rule 36," pertaining to the City's defense of adverse possession and laches.

These admissions requested the admission of genuineness of certain documents and the admissions that certain statements were true. The City filed an answer, but the City did not reply under oath and did not specifically reply to the first 15 statements on pp. 41 and 42, as required by Rule 36 F.R. Civ. P. If these 15 statements are deemed to be answered in the affirmative and including the answer to No. 3, the City made no visible improvements of any kind on these lands remaining on them for the required five years continuous period.

The requirements of the Court of Appeals for remanding the suit to the District Court, for all practical purposes have been carried out and may have thereby become moot.

The City's answer is printed at the end of these questions and also the District Judge's notice of placing the case upon the pre-trial docket, together with the instructions that all papers must be filed within ten days before April 13, 1964. (Filed under separate cover as Appendix K For Appellee Simmons, pp. 48-51.)

We submit to this Honorable Court, that this transcript of Record as shown in the Index pp. I-VII, all

admitted as genuine, the certified copies of the official records and documents, covering a period of over one-half century, is more than what some outstanding historian said about it, and is the most accurate history of what really happened to the settlers, who settled up these dry and semi-arid lands of the Southwest.

A typical historical summary of their hardships may be found in five pages, R. 133-138.

Certainly, to say the least, Texas would not be a state of this Union, had it not been for these men and women who endured these hardships.

In Law, in fact and in equity, on this now cold record, which long ago was very hot, these Settlers-Vendees who got there first, are entitled to these lands rather than those who came subsequently with constructive notice.

Very seldom do the titles of the settlers' homesites get into Federal Courts.

This could be one of the outstanding opportunities ever to come before this Court, in all its history, and may be one of the last, for it to say what it thinks about these deserving settlers and to affirm what the Texas Courts and the Court of Appeals here below, have been saying about them and their vested rights for over one-half a century.

CONCLUSION.

For these reasons stated, it is respectfully submitted that the Judgment of the Court of Appeals below should be affirmed and modified, giving judgment to Simmons rather than remanding the case to the District Court.

Respectfully submitted,

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September 18, 1964.

PROOF OF SERVICE.

I, Greenberry Simmons, one of the Attorneys for Greenberry Simmons, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby Certify that on the 18th day of September, 1964, I served copies of the foregoing Brief for Appellee and Appendix K for Appellee Simmons, which is under separate cover, on the Appellant, City of El Paso, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the respective Attorneys of record as follows:

To Thorton Hardie, Esq.

To William J. Mounce, Esq.

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